No. 86-1417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHARON COLLINS, et al.,

Petitioners,

v.

THE COUNTY OF KENDALL, ILLINOIS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ADDITIONAL STATEMENT OF THE CASE

Petitioners contend that their complaint, which was grounded upon the bad faith exception of the *Younger* doctrine, was improperly dismissed by the district court and wrongfully affirmed by the Seventh Circuit Court of Appeals. Petitioners' complaint alleged bad faith by noting that Respondents instituted approximately thirty-four (34) criminal cases and one (1) civil nuisance case charging

Petitioners with obscenity violations. Although Petitioners state that three (3) cases resulted in not guilty verdicts, Respondents note that three (3) additional cases resulted in findings of guilty.

Both the district court and the Seventh Circuit Court of Appeals carefully reviewed Petitioners' complaint and found that it "failed to set forth facts supporting an inference of bad faith prosecution or harassment." *Collins v. County of Kendall, Ill.*, 807 F.2d 95, 99 (7th Cir. 1986). Both courts carefully considered Petitioners' allegations and viewed them consistent with the mandate of Fed.R. Civ.P. 12(b)(6). The lower courts properly concluded that Respondents' activity, instituting approximately thirty-four (34) criminal prosecutions, some of which have been successful, simply does not approach the threshold level necessary to invoke the bad faith exception of the *Younger* doctrine.

ARGUMENT

I.

PETITIONERS' COMPLAINT WAS PROPERLY DISMISSED PURSUANT TO FED.R.CIV.P. 12(b)(6).

The parties do not dispute the general rule that the federal courts may not enjoin pending state criminal prosecutions. *Younger v. Harris*, 401 U.S. 37 (1971). The rule, however, is not without exception. As Petitioners aptly note, bad faith or harassing prosecution is an exception to the *Younger* doctrine. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975). Petitioners contend that the Seventh Circuit erred in affirming the district court's deci-

sion granting the Respondents' motion to dismiss. Specifically, Petitioners argue that their complaint adequately stated a claim of bad faith and harassing prosecution sufficient to invoke an exception of the *Younger* doctrine. Additionally, Petitioners complain that Sharon Collins was improperly grouped with the other Plaintiffs, for *Younger* purposes. Respondents will address these arguments in *seriatim.*

Initially, Respondents note that although the bad faith exception of *Younger* is available, it is rare that an individual would satisfy the prerequisites for its invocation. One commentator suggests that there is "not a single case in which the Supreme Court has refused to apply *Younger* because of bad faith, harassment, or other extraordinary circumstances." Cook & Sobieski, 2 *Civil Rights Actions*, ¶ 3.15, p. 3-152 (1986). *See also* Wright & Miller, *Federal Practice and Procedure*, § 4255, p. 579 (1978). Because bad faith generally means the bringing of a prosecution "without hope of obtaining a valid conviction" (*Kugler v. Helfant*, 421 U.S. 117, 124 (1975), *quoting*, *Perez v. Ledesma*, 401 U.S. 82, 85 (1971)), the lower federal courts have applied the bad faith exception in only the most grievous of factual circumstances. *See e.g.*, *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972) (over 100 unsuccessful prosecutions combined with illegal searches and a concerted vindictive publicity campaign).

Petitioners rely principally upon *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969) and *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972) in support of their proposition that the bad faith exception of the *Younger* doctrine should be applied in this case. Respondents note, however, that the factual circumstances in *Sheridan* and *Krahm* are not sufficiently analogous so as to lend support to Petitioners' Writ.

Petitioners' reliance upon *Sheridan* and *Krahm* is misplaced. *Sheridan*, a pre-*Younger* decision, contained allegations of prosecutorial misconduct involving the intimidation of witnesses through legal process as well as threats of physicial violence, the wrongful suppression of evidence and other allegations of wrongful conduct, all involving "a 'marked inhibiting effect' on news coverage of the district attorney's investigation." *See Sheridan v. Garrison*, 415 F.2d 699, 702 (5th Cir. 1969). Even assuming that the holding of *Sheridan* is consistent with the principles later addressed by this Court in *Younger*, the allegations of bad faith found in *Sheridan* far exceeds the level of alleged misconduct made by Petitioners against Respondents. Furthermore, *Krahm*, as noted by the Seventh Circuit, involved an "extreme factual situation" not present in the matter before this Court. *Collins v. County of Kendall, Ill.*, 807 F.2d 95, 101 (7th Cir. 1986).[1] Neither *Sheridan* nor *Krahm*, due to their outrageous factual circumstances, lends credence to Petitioners' claim of bad faith under *Younger*.

In support of their argument that Respondents' motion to dismiss was improperly granted, Petitioners argue that Respondents' ultimate goal was to suppress first amendment activity and not to obtain an appropriate determination of the obscenity *vel non* of the materials seized by Respondents. Additionally, Petitioners contend that the

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[1] *Krahm* involved the following conduct: (1) over one hundred (100) unsuccessful prosecutions; (b) extensive press coverage of an anti-pornography campaign spearheaded by the mayor; (c) the utilization of petitions designed to influence the community so that jurors would more likely convict at trial; (d) threatening city magistrates with termination by the mayor and city council; (e) statements tying the plaintiffs with the mafia; and, (f) conducting approximately twelve (12) illegal searches and seizures.

"ultimate aim" of Respondents was the "forced permanent closure of the Denmark Bookstore and total suppression of dissemination of protected material . . ." (Petitioners' Brief, p. 14). Petitioners' argument, however, constitutes mere conjecture because their complaint is wholly insufficient in its attempt to invoke the bad faith exception of the *Younger* doctrine. The Seventh Circuit properly noted that the seizure of books and magazines from Petitioners' store was done pursuant to judicial warrants which were constitutional in all respects. *Collins v. County of Kendall, Ill.*, 807 F.2d 95, 101 (7th Cir. 1984), *citing Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 83 (1984). Furthermore, the Seventh Circuit cited three prosecutions which did result in guilty verdicts. *Collins v. County of Kendall, Ill.*, 807 F.2d at 100.[2]

Contrary to Petitioners' suggestions that their complaint adequately stated a claim, both the district court and the Seventh Circuit specifically noted that the complaint was wholly deficient in its allegations of bad faith or harassing prosecutions. Both Courts applied the appropriate presumptions and inferences owed Petitioners' complaint pursuant to *Conley v. Gibson*, 355 U.S. 41 (1957). The Seventh Circuit found that Petitioners' complaint did not allege that Respondents utilized or threatened to utilize prosecutions "regardless of their outcome" or with "no expectation of convictions, but only to discourage exercise of protected rights." *Collins v. County of Kendall, Ill.*, 807 F.2d

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[2] Even without consideration of the three guilty verdicts, instituting approximately 30 criminal prosecutions over a two year period, does not, in and of itself, constitute bad faith or harassment. *Collins v. County of Kendall, Ill.*, 807 F.2d 95, 99 (7th Cir. 1986), *citing Grandco Corp. v. Rochford*, 536 F.2d 197, 203 (7th Cir. 1976).

95 (7th Cir. 1986), *citing Sheridan v. Garrison*, 415 F.2d 699, 706 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970) and *Cameron v. Johnson*, 390 U.S. 611 (1968). Even applying the "official lawlessness" standard of *Dombrowski v. Pfister*, 380 U.S. 479 (1965), both the district court and the Seventh Circuit properly found that the allegations of Petitioners' complaint failed to meet the elevated standard necessary for the invocation of the bad faith exception. *See also Grandco Corp. v. Rochford*, 536 F.2d 197, 204 (7th Cir. 1976).

Petitioners also argue that even if injunctive relief was unobtainable under the bad faith exception, Sharon Collins should have been considered separate and distinct from the corporation for purposes of *Younger* principles. Petitioners rely solely on *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) in support of their proposition. In rejecting Petitioners' argument, the Seventh Circuit properly noted that *Doran* was not violated when Sharon Collins was grouped in the "same hopper" with the other Petitioners. *Collins v. Kendall County, Ill.*, 807 F.2d at 101-02. It is undisputed that Sharon Collins was an employee who worked for the Denmark Bookstore. She did not possess a separate and distinct business interest nor was she treated separately and distinctly with regard to the prosecutions. Because the interests of all Petitioners are identical in contesting the state litigation, *Doran* does not require that this Court ignore the close relationship among the parties. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975).[3]

[3] Although *Doran* refused to place three separate entities in the "same hopper," this Court also noted that "there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them . . ." *Doran*, 422 U.S. at 928.

CONCLUSION

By reason of the foregoing, this Honorable Court should deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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